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No. 10-884

Supreme Court, U.S.
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In The
Supreme Court of the United States

SAMUEL SCOTT,

Petitioner,

v.

TEXAS,

Respondent.

On Petition For A Writ Of Certiorari To The Texas Court Of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION

SUSAN D. REED
Criminal District Attorney
BEXAR COUNTY, TEXAS

KEVIN PATRICK YEARY*
Assistant Criminal District Attorney
BEXAR COUNTY, TEXAS
PAUL ELIZONDO TOWER
300 Dolorosa, Suite 370
San Antonio, Texas 78205-3030
Telephone No. (210) 335-2734
State Bar No. 22149500
Email: kyeary@bexar.org

Attorneys for the State of Texas

**Attorney of Record*
Representing the State of Texas

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether the Texas harassment statute is unconstitutionally void for vagueness and overbroad.

2. Whether the Texas harassment statute violates the First Amendment because it is a content based restriction on speech and expressive conduct.

3. Whether private argumentative speech should be a protected class of speech.

4. Whether the First Amendment requires an analysis of the distinctions between open-air, face-to-face communications and electronic communications.

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The opinion of the Texas Court of Criminal Appeals is reported at *Scott v. State*, 322 S.W.3d 662 (Tex. Crim. App. 2010). The opinion of the Court of Appeals of Texas, Fourth District, at San Antonio is reported at *Scott v. State*, 298 S.W.3d 264 (Tex. App. – San Antonio 2009).

JURISDICTION

The judgment of the Texas Court of Criminal Appeals was entered on October 6, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATEMENT

I. The statute at issue

This case involves a challenge to the facial constitutionality of Texas' telephone harassment statute. The statute at issue, in pertinent part, provides:

> (a) A person commits an offense if, with intent to harass, annoy, alarm, abuse, torment or embarrass another, he:
>
> * * *
>
> (4) makes repeated telephone communications . . . in a manner reasonably likely to harass, annoy, alarm,

> abuse, torment, embarrass, or offend another.

TEX. PEN. CODE ANN. § 42.07(a)(4) (Vernon 2003). As alleged in this case, the charged offense was a Class B misdemeanor. TEX. PEN. CODE ANN. § 42.07(c) (Vernon 2003). A Class B misdemeanor in Texas is punishable by either "a fine not to exceed $2,000.00," or by "confinement in jail for a term not to exceed 180 days," or by "both such fine and confinement." TEX. PEN. CODE ANN. § 12.22 (Vernon 2003).

II. The background of this case

In two separate cases, Petitioner was charged by information with misdemeanor telephone harassment pursuant to Texas Penal Code section 42.07(a)(4). *See Scott v. State*, 322 S.W.3d 662, 664 (Tex. Crim. App. 2010); *see also* TEX. PEN. CODE ANN. § 42.07(a)(4) (Vernon 2003) (telephone harassment). The first charge, filed on April 24, 2006, alleged in pertinent part that:

> On or about the 5th Day of December, 2005, Samuel Scott, hereinafter referred to as defendant, with intent to harass, annoy, alarm, abuse, torment, and embarrass Yvette Scott, hereinafter referred to as complainant, did make repeated communications to the complainant, to wit: telephone calls, in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, and offend the complainant.

Scott, 322 S.W.3d at 665. The second charge, filed on July 11, 2006, alleged in pertinent part that:

> On or about the 12th Day of March, 2006, Samuel Scott, hereinafter referred to as defendant, with intent to harass, annoy, alarm, abuse, torment, and embarrass Yvette Scott, hereinafter referred to as complainant, did make repeated telephone communications to the complainant in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass and offend the complainant, to wit: the defendant called the complainant repeatedly by telephone while intoxicated, late at night, leaving abusive and harassing voice mail messages.

Id. After he was charged in both cases, Petitioner filed a motion to quash the two charging instruments pending against him. He argued in his motion that Texas Penal Code section 42.07 was unconstitutional on its face because it was both vague and overbroad. *Id.* He contended the statute's vagueness and overbreadth threatened "to induce individuals to forgo [their] First Amendment rights [to free speech] for fear of violating an unclear law." *Id.* But, Petitioner did not argue in his motion that section 42.07 was vague as applied to his own conduct. *Id.*

On June 25, 2008, the trial court held a hearing on Petitioner's motion to quash the charging instruments. At the hearing, in addition to reiterating the arguments he made in his motion, Petitioner argued that the July 11, 2006 information had alleged an

offense under Penal Code Section 42.07(a)(7) (electronic communications harassment). Petitioner argued that both sections 42.07(a)(4) (telephone harassment) and (a)(7) (electronic communications harassment) were unconstitutionally vague and overbroad on their face because the terms "annoy" and "alarm," which are included in both of those subsections, are "inherently vague." He also argued that neither subsection clearly defined whose sensibilities had to be offended and that neither identified the standard by which the criminal conduct was to be measured. Finally, he argued that the specific intent elements in those subsections were not sufficient to cure their problems. In spite of all his arguments, the trial court overruled Petitioner's complaints and denied his motions. *Scott*, 322 S.W.3d at 666. Petitioner then pled no contest to both charges and was sentenced, in each case, to confinement in jail for two days and a $50.00 fine. *Id.*, at 666-667.

On direct appeal, Petitioner raised the same complaints that had been raised in his pre-trial motion to quash. *Scott*, 322 S.W.3d at 667. In addition, he argued – for the first time in the direct appeal – that sections 42.07(a)(4) (telephone harassment) and 42.07(a)(7) (electronic communications harassment) were unconstitutionally vague *as applied* to his conduct. Petitioner argued that both subsections were vague and overbroad because they both utilized the terms "abuse," "torment," "embarrass," and "repeated," which he claimed were, like "annoy" and "alarm," "inherently vague." *Id.* On June

24, 2009, the court of appeals issued its opinion agreeing with Petitioner's arguments and reversed the trial court's judgments. *Id.*

On October 6, 2010, the Texas Court of Criminal Appeals reversed the judgment of the court of appeals. The Court of Criminal Appeals found that the arguments raised by Petitioner for the first time on direct appeal were not preserved for review because they were untimely. *Scott*, 322 S.W.3d at 667 n.5. The Court found that Petitioner had only been charged with offenses pursuant to Texas Penal Code section 42.07(a)(4) and that, consequently, the court of appeals had erred by addressing the constitutionality of Texas Penal Code section 42.07(a)(7). *Scott*, 322 S.W.3d at 668. The Court concluded that Texas Penal Code Section 42.07(a)(4) "is not susceptible of application to communicative conduct that is protected by the First Amendment," and that it "does not implicate the free-speech guarantee of the First Amendment." *Id.*, at 669. The Court also explained the following:

> The statutory subsection, by its plain text, is directed only at persons who, with the specific intent to inflict emotional distress, repeatedly use the telephone to invade another person's personal privacy and do so in a manner reasonably likely to inflict emotional distress. Given that plain text, we believe that the conduct to which the statutory subsection is susceptible of application will be, in the usual case, essentially noncommunicative, even if the conduct includes spoken words. That is to say, in the usual case,

> persons whose conduct violates § 42.07(a)(4) will not have an intent to engage in the legitimate communication of ideas, opinions, or information; they will have only the intent to inflict emotional distress for its own sake. To the extent that the statutory subsection is susceptible of application to communicative conduct, it is susceptible of such application only when that communicative conduct is not protected by the First Amendment because, under the circumstances presented, that communicative conduct invades the substantial privacy interests of another (the victim) in an essentially intolerable manner.

Id., at 669-670.

III. The current claims

In this petition for writ of certiorari, Petitioner presents four questions:

1. Whether the Texas harassment statute is unconstitutionally void for vagueness and overbroad.

2. Whether the Texas harassment statute violates the First Amendment because it is a content based restriction on speech and expressive conduct.

3. Whether private argumentative speech should be a protected class of speech.

4. Whether the First Amendment requires an analysis of the distinctions between

open-air, face-to-face communications and electronic communications.

ARGUMENT

I. Petitioner's second, third, and fourth questions presented have not been properly preserved

To properly invoke this Court's jurisdiction under 28 U.S.C. § 1257(a), Petitioner must show that he has obtained a judgment or decree from the State's highest court concerning the validity of a state statute in light of the constitution, treaties, or laws of the United States. *See* 28 U.S.C. § 1257(a). In *Adams v. Robertson*, 520 U.S. 83 (1997), this Court explained, "[w]ith 'very rare exceptions,' [citation omitted], we have adhered to the rule in reviewing state court judgments under 28 U.S.C. § 1257 that we will not consider a Petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision we have been asked to review." *Adams v. Robertson*, 520 U.S. 83, 86 (1997). In this case, Petitioner clearly raised and preserved in the Texas courts the argument, raised in his first question presented, "Whether the Texas harassment statute is unconstitutionally void for vagueness and overbroad." However, he never asked the state courts directly to decide the issues raised in his second, third, and fourth questions presented.

In addition, this Court's rule 14(g)(i) mandates that a petition seeking review of a state-court judgment contain a concise statement specifying the stages of the proceedings when the federal questions sought to be reviewed were raised, the manner of raising them and the way in which they were passed on by the state courts. SUP. CT. R. 14(g)(i). However, Petitioner has only arguably made such a showing concerning his first question presented. (Pet.Br: 2-3). The statement in Petitioner's brief does not show where or how the issues addressed in his second, third, and fourth questions presented were raised or disposed in the Texas state courts.

With regard to his second, third, and fourth questions presented, Petitioner has failed to properly invoke this Court's jurisdiction under 28 U.S.C. § 1257(a), and he has also failed to comply with this Court's rules concerning a petition seeking review of a state-court judgment. Petitioner's second, third, and fourth questions presented are therefore not properly before this Court.

II. Petitioner has procedurally defaulted any as-applied claims

Although Petitioner does not directly claim that Texas' telephone harassment statute is unconstitutional as applied to his own conduct, to the degree that his claims might be interpreted to be as-applied claims, they are defaulted. The Texas Court of Criminal Appeals observed in its opinion in this case that

Petitioner did not preserve his as-applied claims in this case. The Court observed that, on direct appeal, Petitioner "argued, for the first time, that . . . § 42.07(a)(4) and (a)(7) were both unconstitutionally vague as applied to his conduct." The Court concluded that these "arguments, because they were untimely, were not preserved." *Scott v. State*, 322 S.W.3d at 667 & 667 n.5.

Because Petitioner's as-applied claims have been procedurally defaulted, Petitioner should not be permitted to raise them in this Court. *See, e.g., Johnson v. Zerbst*, 304 U.S. 458 (1939) (describing a waiver as "an intentional relinquishment or abandonment of a known right or privilege.").

III. This is not an "electronic communications" harassment case

Texas' harassment statute is composed of several subsections, defining distinct offenses, each related to the others by a common *mens rea*. *See* TEX. PEN. CODE ANN. § 42.07(a) (Vernon 2003) (providing that "[a] person commits an offense if, with intent to harass, annoy, alarm, abuse, torment, or embarrass another, he:. . . ."). Subsection (a)(4) of Texas' harassment statute, at issue in this case, defines the offense of telephone harassment. TEX. PEN. CODE ANN. § 42.07(a)(4) (Vernon 2003) (providing that a person commits an offense if, with the requisite intent, he "causes the telephone of another to ring repeatedly or makes repeated telephone communications

anonymously or in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another."). Subsection (a)(7) of the statute, on the other hand, defines the offense of electronic communications harassment. TEX. PEN. CODE ANN. § 42.07(a)(7) (Vernon 2003) (providing that a person commits an offense if, with the requisite intent, he "sends repeated electronic communications in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another.").

Petitioner argued to the court of appeals that, in addition to having been charged under subsection (a)(4) of the statute, "he was also charged with violating subsection (a)(7)." *Scott v. State*, 298 S.W.3d 264, 267 (Tex. App. – San Antonio 2009, rev'd). The court of appeals observed that the charge filed against Petitioner on July 11, 2006 contained an allegation that he left "voice mail messages." *Id.* The court of appeals believed that "voice mail messages" fell within the definition of "electronic communications." *Id.* Consequently, the court of appeals concluded that Petitioner had been charged, additionally, with electronic communications harassment under subsection (a)(7) of the statute. *Id.*

The Court of Criminal Appeals rejected the court of appeals' conclusion that Petitioner had been charged in this case with electronic communications harassment. Specifically, the Court of Criminal Appeals observed, "[a] careful reading of the July 11, 2006 information . . . reveals that it tracks the language of (a)(4) . . . but not the language of (a)(7)."

Scott v. State, 322 S.W.3d 662, 668 (Tex. Crim. App. 2010). The Court concluded "that the July 11, 2006 information against Scott was brought under § 42.07(a)(4) and that the court of appeals erred in addressing the constitutionality of § 42.07(a)(7)." *Id.*

Nevertheless, again and again in his brief before this Court, Petitioner implies that this case is one involving "electronic communications" harassment. *See* Pet.Br: 4 ("the statute is so broad that it also prohibits speech on radio, television, and at public events where microphones or bullhorns are used"); 4-5 ("the statute criminalizes all forms of political dissent on the Internet . . . "); 5 ("The Texas Court of Criminal Appeals has . . . drawn . . . distinctions between open-air or face-to-face communications and electronic communications"); 17 ("In 2001, the statute was amended to prohibit certain electronic communications."); 20 ("The statute defines electronic communications as . . . "); 20 ("If [commentators such as Rush Limbaugh, Don Imus, and Howard Stern] are intending to annoy listeners in Texas, then the statute is implicated."); 21-22 ("When Martin Luther King gave his 'I have a Dream' speech on August 28, 1963, he used a microphone. . . ."); 23 ("In our . . . world Twitter, Facebook, Myspace, and . . . blogs all facilitate electronic communication."); 24 ("religious, political, and commercial speech will . . . be implicated when people . . . use . . . emails, or any other electronic devices."); 29 ("Every state and province of the United States has enacted a criminal statute regulating electronic communication" and

"the pervasiveness of this type of regulation calls out for this Court to . . . require that . . . First Amendment protections apply or provide . . . guidance . . . on how to . . . regulate electronic communications."). This is not an electronic communications harassment case.

The Texas Court of Criminal Appeals found that this case did not involve "electronic communications" harassment. Because Texas' highest court has now determined that Petitioner was not charged with electronic communications harassment, this Court should not presume that he was so charged. Out of respect for the independence of state courts, as well as in order to avoid rendering a mere advisory opinion, this Court should refuse to consider in this case Petitioner's attempt to challenge Texas' electronic communications harassment law. *See Michigan v. Long*, 463 U.S. 1032, 1040 (1983) (explaining, "[r]espect for the independence of state courts, as well as avoidance of rendering advisory opinions, have been the cornerstones of this Court's refusal to decide cases where there is an adequate and independent state ground.").

IV. First Amendment jurisprudence controlling this case is not unsettled

Petitioner lists as his first reason for granting this petition that "the law here is unsettled." (Pet.Br: 4). The State disagrees.

The law controlling Petitioner's case is not unsettled, and it is not in need of clarification by this Court. While this Court appears to have never addressed the precise questions raised by the Petitioner in this case, this Court has provided a more than sufficient outline of the constitutional principles at issue here. In addition, other courts have addressed similar claims and have found that telephone harassment statutes, such as Texas' statute, are not facially unconstitutional.

A. Controlling precedent

Petitioner's grounds for review as well as the arguments presented in his petition for writ of certiorari appear to address the facial constitutionality of the Texas telephone harassment statute on the grounds that it is both vague and overbroad. (Pet.Br: i). The "[v]agueness doctrine is an outgrowth . . . of the Due Process Clause of the Fifth Amendment." *United States v. Williams*, 553 U.S. 285, 304 (2008). The overbreadth doctrine, in contrast, is an outgrowth of the First Amendment. *See City of Chicago v. Morales*, 527 U.S. 41, 52 (1999) (explaining, "the overbreadth doctrine permits the facial invalidation of laws that inhibit the exercise of First Amendment rights if the impermissible applications of the law are substantial when 'judged in relationship to the statute's plainly legitimate sweep,'"), *quoting from Broaderick v. Oklahoma*, 413 U.S. 601, 612-615 (1973).

B. Vagueness

This Court's precedent makes clear that ordinary claims of facial unconstitutionality for vagueness can only be sustained when a Petitioner has demonstrated that the statute at issue is vague in ***all*** of its applications. *See Village of Hoffman Estates v. Flipside Hoffman*, 455 U.S. 489, 494-495 (1982) (providing that, in a facial vagueness challenge, a court "should *uphold the challenge only if the enactment is impermissibly vague in all of its applications.*") (emphasis added). A claimant bringing a facial vagueness challenge must also demonstrate that he has not himself engaged in some conduct that is clearly proscribed by the statute. *See Hoffman*, 455 U.S. at 497 (explaining, "A plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to . . . others."); *see also United States v. Mazurie*, 419 U.S. 544, 550 (1975) (explaining, "[v]agueness challenges to statutes which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand."); *Parker v. Levy*, 417 U.S. 733, 756 (1974) (explaining, "[o]ne to whose conduct a statute clearly applies may not successfully challenge it for vagueness."). But Petitioner has not made those showings in this case.

C. Overbreadth

In *United States v. Williams*, 553 U.S. 285 (2008), this Court outlined the only exception to the ordinary

rules for facial vagueness challenges. In that case, this Court made clear that, when a statute is alleged to be vague because it is unclear whether it implicates the First Amendment, the claim can proceed without an initial showing that the statute is vague as applied, but it is only permitted to do so – relaxed from the ordinary requirements – as an *overbreadth* claim. In that case, addressing the vagueness question specifically, this Court explained:

> Although ordinarily "[a] plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others," we have relaxed that requirement in the First Amendment context, permitting plaintiffs to argue that a statute is overbroad because it is unclear whether it regulates a substantial amount of protected speech.

United States v. Williams, 553 U.S. at 304, *quoting from Hoffman*, 455 U.S. 489, 494-495, and nn.6 and 7; *and see Broaderick v. Oklahoma*, 413 U.S. 601, 610-615 (1973) (recognizing that, "facial overbreadth adjudication is an exception to our traditional rules of practice.").

What is also clear is that, in the overbreadth context, a challenger must demonstrate that the statute is not merely overbroad, but *substantially* overbroad. *Broaderick*, 413 U.S. at 615 (explaining that, "particularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as

well, judged in relation to the statute's plainly legitimate sweep."). This Court does not permit statutes to be declared facially unconstitutional based on the conclusion that they might chill only "some" protected expression.

In *Hill v. Colorado*, for example, which involved a challenge to a statute that prohibited certain speech-related conduct within 100 feet of the entrance to any health care facility, this Court observed that the Petitioners had proffered "hypertechnical theories as to what the statute cover[ed]," and concluded that, "speculation about possible vagueness in hypothetical situations not before the Court will not support a facial attack on a statute when it is surely valid 'in the vast majority of its intended applications.'" *Hill v. Colorado*, 530 U.S. 703, 733 (2000). Thus, in *Hill*, the Court again made clear that a facial vagueness attack could not be sustained where the statute at issue is valid in the vast majority of its intended applications and where a court of appeals can only envision a few scenarios where the statute might conceivably be applied in an allegedly unconstitutional way.

Similarly, in *United States v. Williams*, a case involving a similar dual challenge to the alleged vagueness and overbreadth of a statute, this Court explained that the lower court there had made a "basic mistake" in its belief that, "the mere fact that close cases can be envisioned renders a statute vague." *Williams*, 553 U.S. at 305. The Court stated plainly, "[t]hat is not so." *Id.* Then the Court explained, "What renders a statute vague is not the

possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved; but rather the indeterminancy of precisely what that fact is." *Id.*

Although Petitioner in this case has certainly speculated about a number of hypothetical applications of the Texas statute that he believes would render the enforcement of the statute a violation of the First Amendment, many of his speculative hypotheticals are quite implausible, and they certainly do not amount to even a statistically significant number of the conceivable applications of the statute in real life. In real life, this statute is applied against abusive and obnoxious ex-spouses, ex-love interests, or disgruntled business relations who willfully and persistently disrupt the lives of their victims. In real life this statute is applied against persons who use the telephone to bully and abuse their victims; and sometimes the offense is only a precursor to, or a warning of, physical violence to come. And, in the event that this statute is ever used in a manner that arguably violates an accused's First Amendment rights, resort to an as-applied challenge will certainly be sufficient to ensure that the statute is not misused.

D. Application to this case

This case turns on a preliminary question – one that precedes the question of the substantiality of any allegation of overbreadth. This case turns on whether

the Texas telephone harassment statute implicates the First Amendment at all. In fact, the Court of Criminal Appeals rightly concluded in this case that the statute, as drawn, "is not susceptible of application to communicative conduct that is protected by the First Amendment." *Scott*, 322 S.W.3d at 669. The court observed that "in the usual case, person's whose conduct violates [this statute] will not have an intent to engage in legitimate communication of ideas, opinions or information; they will have only the intent to inflict emotional distress for its own sake." *Id.*, at 670. Then the court noted that, "to the extent that [the statute] is susceptible of application to communicative conduct, it is susceptible of such application only when that communicative conduct is not protected by the First Amendment because, under the circumstances presented, that communicative conduct invades the substantial privacy interests of another (the victim) in an essentially intolerable manner." *Id.*

This Court has consistently confirmed the idea that a valid law does not burden First Amendment rights merely because it may incidentally curb some communicative activity. In *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949), for example, this Court affirmed an injunction that prohibited peaceful picketing by union members that was "carried on as an essential and inseparable part of a course of conduct which [was] in violation of the state law." *Giboney*, 336 U.S. at 491-492. This Court observed there that, "it has never been deemed an abridgement

of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Id.*, at 502. Also, in *Rowan v. United States Post Office Dep't*, 397 U.S. 728 (1970), this Court affirmed the constitutionality of a federal law that permitted a householder to require that a mailer remove his name from mailing lists and stop all future mailings to the householder. *Rowan*, 397 U.S. at 729-740. The Court "categorically reject[ed] the argument that a vendor has a right under the Constitution or otherwise to send unwanted material into the home of another" and held that "no one has a right to press even 'good' ideas on an unwilling recipient." *Id.*, at 738.

The Texas telephone harassment statute erects a legal barrier to the use of the telephone as a weapon by a harasser. It defends the right of telephone users and owners to the intended use of their telephones. And it provides a valuable and important tool to law enforcement and victims in the continuing and ongoing fight against domestic violence and other similar kinds of abuse. It does not invade First Amendment rights.

V. Similar telephone harassment statutes affirmed

In *Gormley v. Director, Connecticut State Dep't of Adult Probation*, 449 U.S. 1023 (1980), this Court denied certiorari in a case where the Second Circuit

Court of Appeals found that the Connecticut telephone harassment statute was not unconstitutionally overbroad on its face. *See Gormley v. Director, Connecticut State Dep't of Adult Probation*, 632 F.2d 938 (2nd Cir. 1980). The statute at issue there was very similar to the Texas statute at issue in this case.[1] *See Gormley*, 632 F.2d at 940 n.1. Justice White dissented to the denial of certiorari in that case and pointed out that several state courts had addressed similar statutes and reached conflicting results on the question of their overbreadth. *Gormley*, 449 U.S. at 1025. Justice White argued that, "even if the Court is of the view that the judgment below is correct, there is sufficient reason to grant certiorari and issue a judgment to this effect." *Id.*

Since then, the Supreme Court of West Virginia, in *State v. Thorne*, 333 S.E.2d 817 (1985), has upheld a similar statute.[2] In that case, the Court explained, "Prohibiting harassment is not prohibiting speech, because harassment is not a protected speech." *Id.*, at

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[1] The Connecticut statute at issue there provided, "A person is guilty of harassment when (3) with intent to harass, annoy or alarm another person, he makes a telephone call, whether or not a conversation ensues, in a manner likely to cause annoyance or alarm." CONN. GEN. STAT. § 53a-183(a)(3) (Rev 1958, Supp. 1979)

[2] The statute at issue there provided "It shall be unlawful for any person with intent to harass or abuse another by means of telephone to: . make repeated telephone calls, during which conversation ensues, with intent to harass any person at the called number. . " WEST VIRGINIA CODE § 61-8-16(a)(4) (1984)

819. The Court also concluded, "[h]arassment is not communication, although it may take the form of speech." *Id.* And this Court denied review of that decision. *Thorne v. West Virginia*, 474 U.S. 996 (1985).

After this Court denied certiorari in *State v. Thorne*, the United States Fourth Circuit Court of Appeals reviewed the same case on appeal from the denial of federal habeas relief in federal district court and expressly "agree[d] with the plurality opinion of the Supreme Court of Appeals of West Virginia and with the district court that [the statute at issue there] prohibit[ed] conduct and not protected speech." *Thorne v. Bailey*, 846 F.2d 241, 243 (4th Cir. 1988). Once again, this Court denied certiorari. *Thorne v. Bailey*, 488 U.S. 984 (1988).

The Supreme Court of Pennsylvania, in *Pennsylvania v. Hendrickson*, 724 A.2d 315 (1999), has also upheld a similar statute.[3] The defendant in that case argued that the statute was overbroad and facially unconstitutional. *Hendrickson*, at 317. But the Court found that "the plain language" of the statute sought "to regulate conduct intended to harass another," that

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[3] The statute at issue there provided that a person committed an offense if "with intent to harass another, he . . . (1) ma[de] a telephone call without intent of legitimate communication or address[ed] to or about such other person any lewd, lascivious or indecent words or language or anonymously telephone[d] another person repeatedly; or (2) ma[de] repeated communications anonymously or at extremely inconvenient hours or in offensively coarse language." 18 PA. C.S. § 5504(a)(1) and (a)(2).

it "focuse[d] on the manner and means of communication," that it was "not directed at the content of speech" and that it was "unrelated to the suppression of free expression." *Id.*, at 318.

The Supreme Court of Connecticut also found that a mail harassment statute, with very similar elements to the telephone harassment statute at issue in this case, was not overbroad in violation of the First Amendment. *State v. Murphy*, 757 A.2d 1125 (Conn. 2000). The statute at issue in that case prohibited communicating "with a person by telegraph or mail," if the accused did so "with intent to harass, annoy or alarm another person," and he communicated with the person by telegraph or mail, "in a manner likely to cause annoyance or alarm. . . ." *Id.*, at 1128 n.1. The Court found that the statute proscribed harassing conduct and did not "seek to regulate the content of communications made by mail." *Id.*, at 1131.

The United States also has a law that is similar to the statute at issue in this case. Section 223(a) of the Communications Decency Act currently provides that,

> (a) . . . Whoever –
>
> (1) in interstate or foreign communications –
>
> * * *
>
> (C) makes a telephone call or utilizes a telecommunications device, whether or not conversation or communication ensues, without

> disclosing his identity and with intent to annoy, abuse, threaten, or harass any person at the called number or who receives the communications;
>
> (D) makes or causes the telephone of another repeatedly or continuously to ring, with intent to harass any person at the called number; or
>
> (E) makes repeated telephone calls or repeatedly initiates communication with a telecommunications device, during which conversation or communication ensues, solely to harass any person at the called number or who receives the communication . . . shall be fined under title 18, United States Code, or imprisoned not more than two years, or both.

47 U.S.C. § 223(a)(1)(C), (D), & (E).

This Court has previously addressed the constitutionality of some specific former provisions of section 223. *See Reno v. ACLU*, 521 U.S. 844 (1997) (deciding that provisions of the act that prohibit knowing transmission to minors of "indecent" or certain "patently offensive" communications abridge the right to free speech, and severing "the term 'or indecent' from the statute, leaving the rest of § 223(a) standing," but holding that, "[i]n no other respect, . . .

can § 223(a) or § 223(d) be saved by textual surgery.") (the affected sections appear to have been amended since this Court's decision); *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115 (1989) (deciding that section 223(b)'s ban on indecent telephone messages violated the First Amendment) (the affected section appears to have been amended since this Court's decision). But this Court does not appear yet to have addressed the constitutionality of the parts of section 223 that are similar to the Texas telephone harassment statute.

A few circuit courts that have addressed the constitutionality of 47 U.S.C. § 223 have upheld those parts that are similar to the Texas telephone harassment statute against claims that the federal statute was vague and overbroad. *See United States v. Bowker*, 372 F.3d 365 (6th Cir. 2004) (rejecting "Bowker's argument as to the purported overbreadth of the telephone harassment statute, 47 U.S.C. § 223(a)(1)(C)," and deciding that his "vagueness challenge [also] fails."); *and see United States v. Eckhardt*, 466 F.3d 938 (11th Cir. 2006) (agreeing "with *Bowker* that § 223(a)(1)(C) is not overbroad," and deciding that it also "is not void for vagueness."). But one circuit court determined that, as applied to the facts in the case before it, a part of section 223 that is similar to the Texas statute was unconstitutional. *See United States v. Popa*, 187 F.3d 672 (D.C. Cir. 1999) (deciding that 47 U.S.C. § 223(a)(1)(C) was unconstitutional as applied to Popa but not addressing his claim that the statute was overbroad on its face).

Overall, the clear trend of American case-law – addressing facial vagueness and overbreadth claims against statutes similar to the Texas telephone harassment statute – suggests that the Texas statute is constitutional. There is no doubt that if this Court were to weigh in on the question of the facial constitutionality of the Texas telephone harassment statute, the bench and bar would benefit. However, the trend suggests that this Court should not grant certiorari in this case, unless it intends to affirm the judgment of the Texas Court of Criminal Appeals.

VI. The telephone harassment statute is not vague and it does not implicate First Amendment freedoms

A. Statute is not vague

In his brief, Petitioner contends that he was "accused of making repeated phone calls to his ex-wife . . . that offended ***her***." (Pet.Br: 3) (emphasis added). He also argues, "the statute does not define an objective standard in which to measure to what level of annoyance or alarm is prohibited." (Pet.Br: 13). These statements are factually inaccurate in a constitutionally significant way. A former version of Texas' harassment statute required proof that the actual victim of the crime was offended. That former version of the statute was declared unconstitutionally vague by the United States Court of Appeals for the Fifth Circuit in *Kramer v. Price* for, among other reasons, failing to apply a "reasonable" person standard. *See Kramer v. Price*, 712 F.2d 174 (5th Cir. 1983),

reh'g en banc granted, 716 F.2d 284 (5th Cir. 1983), *grant of relief aff'd*, 723 F.2d 1164 (5th Cir. 1984) (explaining that the former version of Texas' harassment statute, which required proof that the accused "annoy[] or alarm[] ***the recipient***," made "no attempt at all to specify whose sensitivity must be offended," and finding that the statute was "unconstitutionally vague" because, among other reasons, "the standard of conduct it specifie[d] [wa]s dependent on each complainant's sensitivity"; and observing that, "Texas courts have refused to construe the statute to indicate whose sensibilities must be offended"). Also, after *Kramer*, the Texas Court of Criminal Appeals found a former version of Texas' stalking offense to be unconstitutional for, among other reasons, the same kind of flaw. *See Long v. State*, 931 S.W.2d 285, 289 (Tex. Crim. App. 1996) (observing that, "[t]he stalking subsection [contained] a requirement that the conduct be 'specifically directed' toward a particular person," and that, "the subsection also contains the words 'that person,' which appear to specify the perspective as being that of the complainant rather than that of a reasonable person.").

But the Texas Legislature has, since then, amended the Texas telephone harassment statute to cure the infirmity that was found by the Fifth Circuit in *Kramer* and similarly identified by the Texas Court of Criminal Appeals in *Long*. The current version of the statute, under which Petitioner was charged in this case, requires proof that the conduct be undertaken "in a manner reasonably likely to harass, annoy . . . another." TEX. PEN. CODE ANN. § 42.07(a)(4)

(Vernon 2003). And, in this case, the Texas Court of Criminal Appeals specifically construed the text of the statute under which Petitioner was charged to require proof that "the actor make . . . telephone calls in a manner reasonably likely to harass, annoy . . . an ***average person***." *Scott*, 322 S.W.3d at 669 (emphasis added). Therefore, the State submits that this Court should reject Petitioner's contention that he was "accused of making repeated phone calls to his ex-wife . . . that offended *her*." (Pet.Br: 3) (emphasis added).

Petitioner also claims that the terms "harass," "annoy," "alarm," "abuse," "torment," "embarrass," and "offend," in the statute are "inherently vague." (Pet.Br: 11-15). The State disagrees. As the Texas Court of Criminal Appeals observed on discretionary review in this case, the terms "harass," "annoy," "alarm," "abuse," "torment," "embarrass," and "offend," all have definitions that are "commonly understood" and that can be found in the dictionary. *See Scott*, 322 S.W.3d at 669 n.13, quoting from *Webster's Ninth New Collegiate Dictionary* 47, 68, 88, 405, 552, 819 and 1245 (1988).

The term "annoy" in the Texas statute is also not used as that term was used in the statute struck down by this Court in *Coates v. Cincinnati*, 402 U.S. 611 (1971). In *Coates*, this Court found unconstitutional on its face an ordinance prohibiting "three or more persons to assemble . . . on any of the sidewalks . . . and there conduct themselves in a manner annoying to persons passing by. . . ." *Coates*, 402 U.S. at

611-612. In that case this Court observed, "The First and Fourteenth Amendments do not permit a State to make criminal the exercise of the right of assembly simply because its exercise may be 'annoying' to some people." *Id.*, at 615.

The Texas statute at issue here does not prohibit assembly and association in the public square like the statute at issue in *Coates*. The Texas statute instead only prohibits repeated impositions upon the privacy of another through the use of a telephone with intent to annoy, and in a manner reasonably likely to annoy. The Texas statute also, as explained earlier and in contrast to the statute at issue in *Coates*, does not require the level of annoyance necessary to constitute a violation to be measured by the sensibilities of each individual potential victim of the offense; instead, only conduct engaged-in "in a manner reasonably likely to . . . annoy . . . ***an average person***" can constitute an offense. *See Scott*, 322 S.W.3d at 669 (emphasis added).

Furthermore, any potential vagueness existing in the terms "harass," "annoy," "alarm," "abuse," "torment," "embarrass," and/or "offend," is avoided by the resort to the canon of *noscitur a sociis*. In *Williams*, this Court observed that, "the commonsense canon of *noscitur a sociis* . . . counsels that a word is given more precise content by the neighboring words with which it is associated. *Williams*, 553 U.S. at 294-295 (finding that, "'[p]romotes,' in a list that includes 'solicits,' 'distributes,' and 'advertises,' is most sensibly read to mean the act of recommending purported

child pornography to another person for his acquisition."). Similarly, the meanings of each of the words challenged by Petitioner in the Texas statute are narrowed and focused by the other words with which they are associated. *See* TEX. PEN. CODE ANN. § 42.07(a)(4) (Vernon 2003).

Petitioner also contends that the term "repeated" in the statute is too vague to be enforced consistently with the Constitution. But contrary to Petitioner's contention, the term "repeated" as used in the Texas statute is not vague. (Pet.Br: 15-16). The Texas Court of Criminal Appeals found, as it did for the other challenged terms, that the term "repeated" has a "commonly understood" meaning and a definition that can be found in the dictionary. *See Scott*, 322 S.W.3d at 669 n.12, quoting from *Webster's Ninth New Collegiate Dictionary* 998 (1988). That Court also narrowly construed the term "repeated" as used in the statute to mean "more than one telephone call in close enough proximity to properly be termed a single episode." *See Scott*, 322 S.W.3d at 669 n.12. And a careful examination of the text of the statute reveals that the term "repeated" is already limited and narrowed by the phrase "in a manner reasonably likely to harass, annoy . . . another." *See* TEX. PEN. CODE ANN. § 42.07(a)(4) (Vernon 2003) (providing that a person commits an offense if he "makes repeated telephone communications . . . in a manner reasonably likely to harass, annoy . . . another.").

Finally, this Court "has recognized that a scienter requirement may mitigate a law's vagueness,

especially with respect to the adequacy of notice . . . that [the] conduct is proscribed." *Village of Hoffman Estates v. Flipside Hoffman*, 455 U.S. 489, 499 (1982). The statute at issue in this case contains an overriding specific intent requirement that ensures that a person falling within its prohibitions cannot do so without knowing that he would do so in advance. *See* TEX. PEN. CODE ANN. § 42.07(a)(4) (Vernon 2003) (conditioning liability for a violation of the statute on the availability of evidence showing that the suspect acted "with intent to harass, annoy . . . another."). As Judge Johnson explained in her concurrence to the majority opinion below, "the speaker who intends to harass, annoy . . . another has himself defined, for that purpose . . . the applicable term. . . ." *Scott*, 322 S.W.3d at 671 (Johnson, J., concurring). Thus, for yet another reason, it is evident that Texas' telephone harassment statute is not vague.

B. Statute does not implicate the First Amendment

The statute also does not implicate the First Amendment. As the Texas Court of Criminal Appeals explained, "[t]he statutory subsection, by its plain text, is directed only at persons who, with the specific intent to inflict emotional distress, repeatedly use the telephone to invade another person's personal privacy and do so in a manner reasonably likely to inflict emotional distress." *Scott*, 322 S.W.3d at 669-670. The Court further explained that, "to the extent that the statutory subsection is susceptible of application to

communicative conduct, it is susceptible of such application only when that communicative conduct is not protected by the First Amendment because, under the circumstances presented, that communicative conduct invades the substantial privacy interests of another (the victim) in an essentially intolerable manner." *Id.*, at 670.

This is not a case like that addressed in this Court's recent opinion styled *Snyder v. Phelps*, 09-751, 562 U.S. ___ (March 2, 2011) (not yet reported). First, while this case presents a facial attack on a statute, *Snyder* was clearly an as-applied challenge. *See Snyder*, Slip op. at 14 (explaining, "the reach of our opinion here is limited to the particular facts of this case."). Second, the "communication" at issue in this case was transmitted through a telephone, from one person to a singular other person. In contrast, the speech at issue in *Snyder* was conducted "at a public place adjacent to a public street. . . . the archetype of a traditional public forum. . . ." *Snyder*, Slip op. at 10. And third, *Snyder* turned on the conclusion that the speech there was on a matter of "public concern." *See Snyder*, Slip op. at 10. There is little chance that harassing telephone calls will be directed at matters of public concern, but if a charge is ever brought where the argument can be made that the communications related to a matter of public concern, then the rights of the accused would be adequately protected by resort to an as-applied challenge.

Petitioner argues that the statute is "not a time, place, and manner restriction because it is not a

'viewpoint neutral' restriction." (Pet.Br: 27). He is clearly wrong on the issue of the viewpoint neutrality of the Texas statute. The statute at issue here is entirely viewpoint neutral.

While there is no denying that the Texas harassment statute contains the word "communication," it – like the statute at issue in *Hill v. Colorado*, 530 U.S. 703 (2000) – makes no distinction based on the content of the "communication" involved. The Texas statute applies whether the communication involved is a political message or a threat of death, whether it is "pro-Obama" or "anti-Health Care," whether it religious or atheistic, and whether it is a pledge of love or a statement of hate. Therefore, the Texas telephone harassment statute is content-neutral.

The Court of Criminal Appeals' conclusion that the First Amendment is not implicated by the telephone harassment statute is supported by this Court's observations in *Hill* that there is a "recognizable privacy interest in avoiding unwanted communication," that "the unwilling listener[ ] [has an] interest in avoiding unwanted communication," and that the interest in avoiding unwanted communication has been identified as "an aspect of the broader 'right to be let alone.'" *Hill*, 530 U.S. at 716. In *Hill*, the Court also observed that "the right to avoid unwelcome speech has special force in the privacy of the home, [citation omitted], and its immediate surroundings, [citation omitted], but can also be protected in confrontational settings. *Hill*, 530 U.S. at 717.

The State recognizes that, because of recent developments in technology, telephones are no longer only found inside homes; but the State suggests that telephones are still considered by many people to be somewhat of an extension of that home environment. In very real ways, telephones are treated as an extension of ourselves. Telephones are uniquely personal devices through which people communicate and receive desired communications – person to person.[4]

While a telephone is not necessarily always a "confrontational setting," the types of communications and other behaviors that are prohibited by the Texas telephone harassment statute are certainly confrontational. They must, after all, be made repeatedly with an intent to, and in a manner likely to, harass, annoy, alarm, abuse, torment or embarrass, another. That type of activity is inherently confrontational.

To use telephones as they are intended to be used, people must remain open to contact by others; thus, they become vulnerable to attack by others whose desire is anything but consistent with the intended purpose of those devices. A victim's ownership or possession of such a device can be used to inflict harassment upon them. But the Texas statute regulates interference with such devices that might cause people to unplug the phone altogether. In a

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[4] In a different context, this Court has recognized that a person has a valid privacy interest in the content of their telephone communications. *See Katz v. United States*, 389 U.S 347, 353 (1967).

very real sense, the Texas statute protects telephone owners' and users' First Amendment rights by freeing telephones from the types of harassing conduct that interferes with their intended use. And the Texas statute does so without regard to the content of any communications that are used (if any actual communications are used) to cause such interference.

Unlike a radio show or a television program, one cannot simply change the station when one is subjected to a message he or she does not want to hear. Unlike a comedy show with a stand-up comic, one cannot simply get up and leave the theater. To turn off one's phone, one must also sacrifice an enormous amount of potential communication and communication availability that one might legitimately desire through those mediums.

The First Amendment does not protect against narrowly tailored statutes, such as the one at issue here, that prohibit repeatedly engaging in conduct toward another with the intent to cause an unpleasant emotional reaction in the other – including fear, annoyance, alarm, offense, torment, abuse, or embarrassment – in a manner reasonably likely to bring about those emotional responses in an average person. *See Hill*, 530 U.S. at 724 (upholding a statute which sought "to protect those who enter[ed] a health care facility from . . . harassment, . . . nuisance, . . . persistent importuning, . . . following, . . . dogging, and . . . implied threat of physical touching."). The privacy interest in avoiding unwanted communications identified in *Hill* is implicated by that kind of conduct. *See Hill*, 530 U.S. at 716.

The Texas statute is narrowly tailored to protect the interest in avoiding repeated harassing, annoying, alarming, abusive, tormenting, embarrassing and offensive telephone communications that are made in a manner reasonably likely to achieve those responses. *Id.* The statute protects and defends the broader "right to be let alone" of persons who make use of telephones. *Id.* Although the First Amendment certainly protects the right to speak -- even messages that are sometimes deemed offensive – that right does "not always embrace offensive speech that is so intrusive that the unwilling audience cannot avoid it." *Hill*, 120 U.S. at 2489, *citing Frisby v. Schultz*, 487 U.S. 474, 487 (1988) (upholding a general ban on residential picketing).

Petitioner argues that a "phone . . . can simply be turned off." (Pet.Br: 29). But that is not an adequate option. While it certainly is a response that would prevent a victim of telephone harassment from some continuing negative effects of telephone harassment, that response fails to address other sometimes more important concerns. The owner or user of a telephone will possess such a device for at least two reasons: (1) to be able to communicate with others, and (2) to be available to receive communications from others. If the telephone is "turned off" in response to harassment, or if the receipt of wanted calls and messages are delayed because of the actions of a harasser, the rights of the telephone owner have been infringed in an essentially intolerable way. No longer can the telephone user make a call – if the desire so strikes him or her – without fear of being subjected to further

harassment. No longer can the telephone user stay connected to friends and acquaintances who might otherwise be capable of providing needed or desired information about events and circumstances relevant to the life of the phone user. So for at least those reasons and possibly for other reasons as well, Petitioner's suggestion that a phone be turned off is not a valid option.

CONCLUSION

Samuel Scott's petition for writ of certiorari should be denied. Or, in the alternative, should this Court decide to grant certiorari in this case, it should be granted only so that this Court can affirm the judgment of the Texas Court of Criminal Appeals.

Respectfully submitted,

SUSAN D. REED
Criminal District Attorney
BEXAR COUNTY, TEXAS

KEVIN PATRICK YEARY*
Assistant Criminal District Attorney
BEXAR COUNTY, TEXAS
PAUL ELIZONDO TOWER
300 Dolorosa, Suite 370
San Antonio, Texas 78205-3030
Telephone No. (210) 335-2734
State Bar No. 22149500
Email: kyeary@bexar.org

Attorneys for the State of Texas

**Attorney of Record*
Representing the State of Texas